Supreme Court, U.S.
FILED
FEB 7 2002
CLERK

(2)

No. 01-992

In The

Supreme Court of the United States

GUSTO RECORDS, INC., GML, INC.,
NASHVILLE QUALITY DUPLICATION, INC.,
INTERNATIONAL MARKETING GROUP, INC.,

Petitioners,

v.

DONALD M. DAILY and HAROLD W. DAILY, JR.,
Individually and as Independent Co-Executors of The
Estates of Mr. and Mrs. Harold W. "Pappy" Daily,
GLAD MUSIC COMPANY,

Respondents.

On Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Sixth Circuit

BRIEF IN OPPOSITION

DAVID W. SHOWALTER
LAW OFFICES OF DAVID
W. SHOWALTER, P.C.
5231 Bellaire Blvd.
Bellaire, TX 77401
(713) 660-0491
(713) 660-0493 (fax)

TRACY J. WILLI
Counsel of Record
BANKSTON & RICHARDSON, L.L.P.
400 W. 15th Street,
Suite 710
Austin, TX 78701
(512) 499-8855
(512) 499-8886 (fax)

Attorneys for Respondents

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

21 pp

QUESTIONS PRESENTED

1. Whether the Sixth Circuit's decision in an unreported order denying a Petition for Rehearing and re-affirming punitive damages specific to each of four defendants ranging from $31,250 to $250,000 after the reduction of compensatory damages violates due process.[1]

2. Whether the Petitioners waived any due process complaint as to the amount of punitive damages for failure to raise any due process complaint until their Petition for Rehearing in the Court of Appeals.

---

[1] The Petitioners' Question Presented incorrectly states that the ratio complained of is $1 to $739,750. PETITION at i. The punitive damage awards were specific to each Petitioner and apportioned as follows: G.M.L., Inc. $250,000; Gusto Records, Inc. $250,000; Nashville Quality Duplication, Inc. $31,250; and International Marketing Group, Inc. $208,500. APP. 37-39. No single defendant is liable for $739,750 in punitive damages.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 29.6, Respondents Donald M. Daily and Harold W. Daily, Individually and as Independent Co-Executors of the Estates of Mr. and Mrs. Harold "Pappy" Daily and Glad Music Company submit that there are no parent or publicly held companies that own more than 10% of the company's stock.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

CORPORATE DISCLOSURE STATEMENT ii

TABLE OF AUTHORITIES iv

STATEMENT OF THE CASE 1

STATEMENT OF FACTS 1

REASONS WHY PETITION SHOULD BE DENIED ... 7

I. The Sixth Circuit's decision does not violate due process and the Court did not depart from the accepted and usual course of judicial proceedings 7

A. Tennessee law supports punitive damage awards based upon nominal damage awards 8

B. "Ratio" analysis is given little weight in nominal damage cases 9

II. Waiver of complaint as to amount of punitive damages 12

CONCLUSION 15

TABLE OF AUTHORITIES

Page

FEDERAL CASES

Adams v. Robertson,
520 U.S. 83, 117 S.Ct. 1028, 137 L.Ed.2d 203 (1997) 14

American Business Interiors v. Haworth, Inc.,
798 F.2d 1135 (8th Cir. 1986) 9

BMW of North America v. Gore,
517 U.S. 559, 116 S.Ct. 1589, 134 L.Ed.2d 809 (1996) 9, 10

Donavan v. Penn Shipping Co., Inc.,
429 U.S. 648, 97 S.Ct. 835, 51 L.Ed.2d 112 (1977) 8

Edwards v. Jewish Hospital of St. Louis,
855 F.2d 1345 (8th Cir. 1988) 10

Hidden Oaks Limited v. City of Austin,
138 F.3d 1036 (5th Cir. 1998) 14

Mason v. Oklahoma Turnpike Authority,
182 F.3d 1212 (10th Cir. 1999) 14

Tronzo v. Biomet, Inc.,
236 F.3d 1342 (Fed. Cir.), *cert. denied*, 122 S.Ct. 580 (2001) 9, 10, 14

TXO Production Corp. v. Alliance Resources Corp.,
509 U.S. 443, 113 S.Ct. 2711, 125 L.Ed.2d 366 (1993) 7, 9, 14

STATE CASES

Braswell v. Carothers,
863 S.W.2d 722 (Tenn. Ct. App. 1993) 8

Jacque v. Steenberg Homes, Inc.,
563 N.W.2d 154 (Wisc. 1997) 10

TABLE OF AUTHORITIES – Continued

Page

Oakley v. Simmons,
799 S.W.2d 669 (Tenn. Ct. App. 1990) 8

Walker v. Cleary Petroleum Corp.,
421 So.2d 85 (Ala. 1982) 10

Whittington v. Grand Valley Lakes, Inc.,
547 S.W.2d 241 (Tenn. 1977) 8, 10

STATEMENT OF THE CASE

Respondents, Donald M. Daily and Harold W. Daily, Individually and as Independent Co-Executors of the Estates of Mr. and Mrs. Harold W. "Pappy" Daily and Glad Music Company, respectfully urge the Court to deny Petitioners' Petition for Writ of Certiorari to review the order on Petition for Rehearing of the United States Court of Appeals for the Sixth Circuit. The order does not conflict with decisions of other circuits, is fully consistent with Tennessee law, is fully consistent with the decisions of this Court, and does not otherwise raise important constitutional or federal questions warranting this Court's review. Further, any constitutional complaint as to punitive damages has been waived.

This case has all the attributes of a case in which punitive damages are justified and none of the attributes which justify this Court's review. This Brief in Opposition is filed to correct misstatements made in the Petition for Writ of Certiorari, such as the incorrect ratio stated in Petitioners' Question Presented, and to point out procedural barriers which will prevent the issues from being properly presented to this Court for review.

STATEMENT OF FACTS

This case involves a malicious and fraudulent scheme to avoid payment of royalties coupled with a history of bad faith. The conspirators used trickery and deceit to

achieve their goals. APP. 2, 25, 35-38.[2] It is incorrect for Petitioners to say that no court has articulated the reprehensible conduct that the Petitioners engaged in which entitles the Respondents to punitive damages.[3]

> "The proof adduced at trial showed Defendants benefitted from the exploitation of George Jones masters produced by Pappy Daily by entering into an agreement to mask the lawful title and ownership of the masters through a complex web of business relationships and through the use of irregular and obfuscatory accounting methods." APP. 32. "Under the proof submitted, it appears the music industry requires that a high degree of trust be placed on persons and/or companies that exploit, manufacture, distribute, and sell the master records and recordings of writers, artists, and producers. In turn these persons and/or companies are expected to accurately account for, report, and pay what is owed to the artists, publishers, and producers in royalties. In this case, there was substantial evidence from which a jury could conclude that a civil conspiracy existed between the named Defendants to purposefully and intentionally avoid paying the producer's royalties owed to the Plaintiffs." APP. 34.

---

[2] "APP." refers to the Appendix attached to the Petition for Writ of Certiorari.

[3] The Court of Appeals opinion addressed facts which support the punitive damage findings, but not in response to a constitutional due process challenge because that issue was never raised in the appellate briefs. APP. 5-28. In the order denying the Petition for Rehearing, the Court of Appeals provided analysis on the newly raised constitutional due process claim. APP. 1-4.

"Furthermore, when viewed in toto, the record shows clear and convincing evidence that his conduct was intentional, reckless, malicious, and/or fraudulent such that punitive damages are justified. The intentional nature of this conduct can be reasonably inferred from the following facts. Defendants knew they were in sole control of the information regarding the transfers of titles and ownership of the masters and of the sales records and licensing agreements. They knew they were not making any producer's royalty payments on the masters at issue, and they tried to avoid payment by masking the trail of title ownership and responsibility for payment. When questioned about their liability for payment, Defendants initially denied they owed Plaintiffs any royalties and assumed the defensive position of demanding Plaintiffs produce the documents and records to prove their claim. Defendants were aware that their records and record-keeping methods prevented any clear resolution of this problem. At trial, one of the Defendants candidly admitted that producer's royalties were owed to Plaintiffs on some of the masters, but it could not determine how much and on which masters." APP. 24-25, quoting MEMO OP. JA[4] 243.

"Defendants' wrongful conduct continued for over a decade. It was ended only when Plaintiffs decided to spend the substantial amount of money required for an investigation and vigorous prosecution of this action. This began their aggressive efforts to vindicate their rights

---

[4] "JA" refers to the Joint Appendix in the Court of Appeals.

> and to end the wrongful withholding of producer's royalties owed to Plaintiffs by the Defendants." MEMO OP. JA 243; summarized in APP. 35.

The fraudulent scheme was complex and requires a basic overview of the evidence. The Petitioners/Defendants are intertwined companies owned by two individuals, Mr. Gayron "Moe" Lytle and Mr. Stephen Hawkins. Lytle is the president, and sole shareholder of G.M.L., Inc. ("GML"), Gusto Records, Inc. ("Gusto"), International Marketing Group, Inc. ("IMG"), and Nashville Quality Duplication, Inc. ("NQD"). APP. 10; JA 520-521. All of the Lytle entities operate at the same address. APP. 10; JA 520-521.

Hawkins is the sole owner of Highland Music, Inc. APP. 9; JA 421. Hawkins uses an office at Lytle's place of business. JA 439. Highland's secretary was also Lytle's Certified Public Accountant. JA 496. Highland started out in this litigation with the same attorney as Gusto/GML. JA 441-442. Highland Music did not exist until it made its deal with Gusto/GML in 1987. APP. 9; JA 442.

Highland does business differently with Gusto/GML than with any other business entity. APP. 10-11; JA 431. Generally, with any other company, Highland pays a per-track rate as opposed to Gusto/GML's percentage of a particular sale. APP. 11; JA 431. The license agreements between Gusto/GML and Highland stated they were exclusive between the companies. JA 533; 962, 965, 969. However, Lytle testified that they were not exclusive if he decided they were not exclusive. APP. 9; JA 533. There were numerous credits and accounting transfers between the companies that were unexplained. Exhibit 150 is a

credit memo for $363,000 from Highland to IMG dated January 12, 1994. Hawkins could not testify as to the reason for this credit memo – it could be for product or a pricing adjustment. APP. 11; JA 492. The license agreement between GML/Gusto and Highland was not standard for the industry. The indemnity which usually runs from the owner of the masters to the licensee to guarantee that the owner actually holds title to the masters, ran the opposite direction in the Defendants' agreement. APP. 9; JA 640.

There was no paperwork formalizing the alleged transfers and agreements between the companies. APP. 9-10; JA 558-560. The Defendant companies were organized in such a fashion as to cause the George Jones masters in question to be passed back and forth, like a shell game, each company in turn skimming off revenue that was never reported to the Daily's. JA 522-537, 561-562, 575-583.

The Defendants had a history of bad faith which was demonstrated to the jury. For example, when Hawkins flatly denied ever participating with Lytle in efforts to avoid other royalty obligations, he was impeached with the fact that Hawkins (individually) and Highland had been found in contempt of court because they "deliberately aided and abetted Gusto Records and GML in violating an express term of a prior court order" prohibiting the exploitation of certain master recordings. APP. 22, 33.

There are several events of misconduct which occurred over the years which contributed to the punitive damages award. For example, in 1982, Mr. Lee Trimble, who worked for Lytle, told Daily that Lytle was in the process of investigating and demanding assurances that

any producer's royalties on George Jones masters would be satisfied. JA 555-556, 2175. Lytle knew that Trimble had previously worked for Daily and Daily would trust Trimble's assurances. JA 551-552, 555-557. The Court of Appeals opinion is referring to Trimble when it speaks of the "intermediary" that Gusto sent to negotiate with Daily. APP. 8. Petitioners' reference to its negotiations with Respondents over the years as "logically inconsistent" with the conspiracy finding ignores the fact that the negotiations were used to perpetrate the fraud. PET. at 8.

Defendants' reprehensible conduct did not cease even during the litigation. The masters changed hands without documentation at least twice during the litigation – first in 1994, and again in 1997. In 1994, after Plaintiffs had filed suit, GML sold the masters in question back to Gusto without any written agreement to document the transfer. APP. 12; JA 558. Lytle discussed the transaction with his CPA firm and they made some kind of accounting entry and the transfer occurred. APP. 12; JA 559. He did not know how much debt that Gusto owed GML after the transaction. JA 559.

On December 4, 1997, during the pendency of this litigation, Gusto sold the Springboard Catalog to Catalogue Music, Ltd. – another Hawkins entity. APP. 12; JA 545, 1940. Lytle did not give the Daily's notice of the sale, even though it affected the George Jones masters at issue and for which the Daily's sought recission. App. 12; JA 547. The agreement was for $3.5 million. APP. 12; JA 1940.

On December 19, 1997, several days after the deal was signed, Lytle testified in his deposition in this case that Gusto still owned the Springboard masters. JA 544.

Plaintiffs finally learned of the sale in June 1999, about a month before trial. App. 12; JA 655. Lytle took the position again at trial that Gusto owned the masters as of December 19, 1997. JA 544. The jury considered this and other evidence in its evaluation of punitive damages. The trial court further found that Defendants' failure to disclose the sale to plaintiffs was sanctionable. App. 12.

This Court does not require lower courts to articulate their reasons for upholding punitive damage awards. *TXO Production Corp. v. Alliance Resources Corp.*, 509 U.S. 433, 465, 113 S.Ct. 2711, 2724, 125 L.Ed.2d 366 (1993). However, the lower courts in this case have done just that. *See*, App. 29-39 [Dist. Ct.'s Findings of Fact and Conclusions of Law]. To recite every fact from the record which supports the punitive damage awards would result in opinions at least twice as long with no additional jurisprudential value.[5] The record and the lower courts' decisions support the jury's punitive damage awards.

REASONS WHY PETITION SHOULD BE DENIED

I. The Sixth Circuit's decision does not violate due process and the Court did not depart from the accepted and usual course of judicial proceedings.

The conspiracy to defraud claim which supports the punitive damage awards is a state law claim. State law

[5] The Court of Appeals and the District Court recognized that this case had little jurisprudential value and ordered the opinions unpublished.

principals govern whether punitive damages are available for a state law claim and the review of the size of jury verdicts is a matter of federal law. *Donavan v. Penn Shipping Co., Inc.*, 429 U.S. 648, 649, 97 S.Ct. 835, 836-37, 51 L.Ed.2d 112 (1977).

A. Tennessee law supports punitive damage awards based upon nominal damage awards.

Petitioners argue about the Sixth Circuit's interpretation of Tennessee's common law – an issue better left to the Tennessee Supreme Court. In Tennessee, punitive damages are available upon the finding of injury, regardless of whether compensatory damages are awarded. *Whittington v. Grand Valley Lakes, Inc.*, 547 S.W.2d 241, 242 (Tenn. 1977); *Oakley v. Simmons*, 799 S.W.2d 669 (Tenn. Ct. App. 1990). Thus, the punitive damage awards based upon nominal damages is supported by Tennessee law.

Petitioners' reference to the *Braswell* case is misleading. *Braswell v. Carothers*, 863 S.W.2d 722 (Tenn. Ct. App. 1993). *Braswell* states the general rule that a tort must be complete to be actionable. *Braswell* does not address the issue of whether, in an intentional and evil motive type case, injury may be found without a finding of compensatory damage. That issue is governed by the Tennessee Supreme Court in *Whittington, supra.*

B. "Ratio" analysis is given little weight in nominal damage cases.

This Court has recognized that in cases like this involving malicious and fraudulent schemes to steal royalties coupled with a history of bad faith, a dramatic disparity between actual damages and punitive damages is not controlling. *TXO Production Corp. v. Alliance Resources Corp.*, 509 U.S. 443, 113 S.Ct. 2711, 125 L.Ed.2d 366 (1993) (526:1 ratio held not excessive). This Court was careful to make accommodations for cases such as this:

> [L]ow awards of compensatory damages may properly support a higher ratio than high compensatory awards, if, for example, a particularly egregious act has resulted in only a small amount of economic damages. A higher ratio may also be justified in cases in which the injury is hard to detect or the monetary value of noneconomic harm might have been difficult to determine.

BMW of North America v. Gore, 517 U.S. 559, 582, 116 S.Ct. 1589, 1602, 134 L.Ed.2d 809 (1993). When the injury has occurred, but is not quantifiable, there is no necessary correlation between the amount of punitive damages that may be properly assessed and the amount of compensatory damages.

Other United States Courts of Appeals and State Supreme Courts that have addressed the issue have disposed of it in a similar fashion. *See, e.g., Tronzo v. Biomet, Inc.*, 236 F.3d 1342, 1347-1351 (Fed. Cir.), *cert. denied*, 122 S.Ct. 580 (2001) ($520 incidental damages supported punitive damages of $20 million); *American Business Interiors v. Haworth, Inc.*, 798 F.2d 1135, 1136 (8th Cir. 1986)

(upholding punitive damages of $250,000 based upon $1 nominal damages); *Whittington*, 547 S.W.2d at 242 (punitive damages upheld where compensatory damages were denied); *Walker v. Cleary Petroleum Corp.*, 421 So.2d 85 (Ala. 1982); *Jacque v. Steenberg Homes, Inc.*, 563 N.W.2d 154 (Wisc. 1997) (nominal damages of $1 supported punitive damages of $100,000). When nominal damages are awarded the ratio factor has little or no significance. *Edwards v. Jewish Hospital of St. Louis*, 855 F.2d 1345, 1352 (8th Cir. 1988) (appellant was not entitled to reduction of punitive damage award from $25,000 to reflect reduction in actual damages from $50,000 to $1.00 nominal damages). Nominal damages support a much higher ratio of punitive damages.

Under federal analysis, the constitutionality of a punitive damages award is not simply a matter of numbers or ratios. *Tronzo*, 236 F.3d at 1350. The constitutionality of a punitive damage award involves the consideration of three "guideposts," only one of which is the ratio of compensatory to punitive damages. The court must also consider the reprehensibility of the conduct and any civil or criminal penalties for similar conduct. And of these three guideposts, it is not the ratio of the punitive to compensatory damages, but the reprehensibility of the conduct that is deemed by this Court to be "the most important indicium of the punitive damages award." *BMW of North America*, 517 U.S. at 575, 116 S.Ct. at 1599. Petitioners focus their argument solely on the ratio analysis, but their discussion of this factor is too simplistic. The guidepost articulated by this Court was the ratio of punitive damages to "actual and *potential* damages." *Id.* at 582; *Tronzo*, 236 F.3d at 1350 (ratio after

reduction to compensatory damages went from 2.8 to 1 to 38,000 to 1 – punitive damages upheld).

The jury's separate findings imposing punitive damages in differing amounts for each specific defendant reflect a careful assessment of the gravity of each defendant's conduct and other relevant factors, and none of these awards may be said to be the result of passion or prejudice. The jury considered the evil motives and the complicated scheme composed to effect the fraud. The jury was further instructed to consider nine other factors in determining the amount of punitive damages including (1) Defendants' financial affairs, financial condition and net worth; (2) the nature and reprehensibility of Defendants' wrongdoing, which the court defined as the impact of Defendants' conduct on Plaintiffs and the relationship of Defendants to Plaintiffs; (3) Defendants' awareness of the amount of harm being caused and its motivation in causing it; (4) the duration of Defendants' misconduct and whether Defendants attempted to conceal the conduct; (5) the expense Plaintiffs bore in attempting to recover their losses; (6) whether Defendants profited from the activity and, if so, whether the punitive damages award should be in excess of the profit in order to deter similar future behavior; (7) whether, and the extend to which, Defendants have been subjected to previous punitive damages awards based upon the same wrongful act; (8) whether, once the misconduct became known to Defendants, Defendants took remedial action or attempted to make amends by offering a prompt and fair settlement for actual harm caused; and (9) any other circumstances shown by the evidence that bear on determining the proper amount of the punitive damages

award. App. 29-30. The sufficiency of the evidence on any of these nine factors has not been challenged. App. 25.

The lower courts reviewed and considered the reprehensible nature of the Petitioners' fraudulent scheme involving trickery and deceit. The Court of Appeals made short work of "the difference between the punitive damage award and other civil or criminal penalties imposed for comparable conduct" factor. There were over 200 George Jones masters at issue. JA 404, 512, 695, 743, 1967-2070, 2176, 3401, 2449-2453. "It is not difficult to conceive that defendants' conduct, if compared on a per violation basis [$1,000 per violation under the Tennessee Consumer Protection Act], would result in substantial civil penalties comparable to the punitive damages awarded here." App. 3. The Petition for Writ of Certiorari should be denied.

II. Waiver of complaint as to amount of punitive damages.

The jury awarded $165,000 in compensatory damages on the conspiracy claim for which all five[6] defendants were jointly and severally liable. The jury also awarded punitive damages apportioned separately against each of the four Petitioners as follows:

---

[6] Highland Music Company was also a defendant found jointly and severally liable for the $165,000 in conspiracy damages and found liable for $44,500 in punitive damages. Highland has not joined in the Petition for Writ of Certiorari.

DEFENDANT	PUNITIVE DAMAGES	RATIO TO $165,000 (Joint and Several)
G.M.L., Inc.	$250,000	1.51 to 1
Gusto Records, Inc.	$250,000	1.51 to 1
NQD, Inc.	$31,250	.19 to 1
IMG, Inc.	$208,500	1.26 to 1

Not surprisingly, Petitioners chose not to complain of excessiveness of the punitive damage awards of these modest ratios on appeal.[7] The only issue stated or argument raised in the Brief of Appellants in the Court of Appeals was that "Plaintiffs' claim for punitive damages, therefore, should fail because the Gusto Defendants are entitled, for the reasons set forth above, to judgment as a matter of law on the conspiracy claim." BRIEF OF APPELLANTS at 46-47. The only relief requested from the Court of Appeals was "to reverse the judgment and dismiss the case." BRIEF OF APPELLANTS at 48. Now, after the Court of Appeals reduced the compensatory damages for conspiracy to $1, Petitioners suggest that the jury's punitive damage awards should not be upheld as excessive under the Fourteenth Amendment. The first time Petitioners challenged the *amount* of punitive damages was in the Petition for Rehearing after the Court of Appeals rendered its opinion.[8] The constitutional challenge raised for

---

[7] The Petitioners did include a complaint of "excessiveness" in their Memorandum of Law in Support of their Second Motion for Judgment as a Matter of Law or, in the Alternative for New Trial. However, Petitioners made no mention, even then, of a federal constitutional challenge.

[8] The Petitioners did not, "challenge the district court's acceptance of the punitive damages awards, or its findings on

the first time in the Petition for Rehearing has been waived. *See Adams v. Robertson*, 520 U.S. 83, 89 n.3, 117 S.Ct. 1028, 1031 n.3, 137 L.Ed.2d 203 (1997) (federal due process claim raised for the first time in a petition for rehearing was not properly presented to the court below and writ of certiorari was dismissed as improvidently granted). *See also TXO Production Corp.*, 509 U.S. at 462-64, 113 S.Ct. at 2723 (declined to review constitutional attack to punitive damage award which was not properly presented to the court below); *Hidden Oaks Limited v. City of Austin*, 138 F.3d 1036, 1045 n.6 (5th Cir. 1998) (issue raised for the first time in reply brief is waived); *Tronzo v. Biomet, Inc.*, 236 F.3d 1342, 1347-1351 (Fed. Cir.), *cert. denied*, 122 S.Ct. 580 (2001) (where appellant did not challenge *amount* of punitive damages, it could not challenge the ratio of punitive damages to compensatory damages when the compensatory damages were reduced); *Mason v. Oklahoma Turnpike Authority*, 182 F.3d 1212, 1214 (10th Cir. 1999) (constitutional objection to excessiveness of punitive damages waived when only common-law challenge was raised on appeal); F.R.A.P. 28 (briefs must include a statement of the issues presented for review).

---

the specific factors considered by the jury in determining the proper amount to be awarded." APP. 25.

CONCLUSION

Respondents respectfully request this Court to deny the Petition for Writ of Certiorari.

Respectfully submitted,

TRACY J. WILLI
BANKSTON & RICHARDSON, L.L.P.
400 West 15th St., Suite 710
Austin, Texas 78701
(512) 499-8855
(512) 499-8886 (fax)

DAVID W. SHOWALTER
LAW OFFICES OF
DAVID W. SHOWALTER, P.C.
5231 Bellaire Blvd.
Bellaire, TX 77401
(713) 660-0491
(713) 660-0493 (fax)